JUN 20 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT DUNN,
Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

NO. 77-6949

PETITION FOR WRIT OF CERTIORARI

COMES NOW the above named appellant, through his court appointed counsel, Daniel J. Sears, Federal Public Defender for the District of Colorado, and for his Petition for Writ of Certiorari states to the Court as follows:

1. The appellant, Robert Dunn, was convicted on three (3) counts of a five-count indictment charging false declarations before a grand jury, in violation of Title 18, United States Code, Section 1623. The verdict was returned on April 14, 1977, and appellant was thereafter sentenced on May 23, 1977, to five (5) years imprisonment on Count II, and the same sentences on convictions for Counts III and IV, to run concurrent to one another. Appellant filed a timely Notice of Appeal and the matter was heard before the United States Court of Appeals for the Tenth Circuit. On June 5, 1978, the Tenth Circuit affirmed the conviction of the trial court. A copy of its Opinion is attached hereto.

2. The judgment sought to be reviewed was filed in the United States Court of Appeals for the Tenth Circuit on June 5, 1978. Jurisdiction is conferred on this Honorable Court to review said judgment by Writ of Certiorari under Title 28, United States Code, Section 1254(1).

3. The questions presented for review on appeal and by Writ of Certiorari are as follows:

Can declarations made before a federal grand jury under a grant of immunity pursuant to 18 U.S.C. §6002-6003, be used to establish the corpus delecti of an inconsistent declarations prosecution under Title 18, United States Code, Section 1623(c), without its first being established that the declarations under immunity were false, thereby violating the immunity order?

Can a proceeding in a private attorney's office before a local court reporter be deemed to be a proceeding ancillary to a U. S. Court or a federal grand jury proceeding in sustaining a conviction under 18 U.S.C. §1623(c)?

Can an admission by a witness before a federal district judge that 90 percent of his grand jury testimony was false be relied upon in sustaining a perjury conviction when the only theory presented to the trial court and jury was one of inconsistent declarations under Title 18, United States Code, Section 1623(c)?

4. This case involves the following citations of law:

Cases

Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)

People v. Denson, 59 Ill.2d 546, 322 N.E.2d 464 (1975)

United States v. Alter, 482 F.2d 1016 (9th Cir. 1973)

United States v. Berardelli, 565 F.2d 24 (2nd Cir. 1977)

United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974) cert. den., 420 U.S. 925

United States v. Doe, 361 F.Supp. 226 (E.D. Penn., 1973) affirmed, 485 F.2d 682 (3rd Cir. 1973) cert. den., 415 U.S. 989

United States v. Housand, 550 F.2d 818 (2nd Cir. 1977)

United States v. Patrick, 542 F.2d 381 (7th Cir. 1976) cert. den., ___ U.S. ___

Statutes

Title 18 United States Code, Section 1621

Title 18 United States Code, Section 1623

Title 18 United States Code, Section 1623(a)

Title 18 United States Code, Section 1623(b)

Title 18 United States Code, Section 1623(c)

Title 18 United States Code, Section 1623(d)

Title 18 United States Code, Section 3503

Title 18 United States Code, Section 3503(d)

Title 18 United States Code, Section 3503(g)

Title 18 United States Code, Section 6001(4)

Title 18 United States Code, Section 6002

Title 18 United States Code, Section 6003

Other

United States Constitution, Fifth Amendment

U. S. Code Congressional and Administrative News, 1970 Session, Vol. II, pages 4008-4009

5. On December 15, 1976, appellant Robert Dunn was indicted on five counts of false declarations before a grand jury or court pursuant to Title 18 United States Code, Section 1623. The indictment alleged inter alia that Dunn had made sworn declarations before a federal grand jury on June 16, 1976, and subsequently, on December 30, 1976, had made sworn declarations before a court reporter in the office of a local attorney "in a proceeding ancillary to United States vs. Musgrave, et al., Criminal Case No. 76-CR-155." The indictment further alleged that the "aforesaid declarations . . . were inconsistent to the degree that one of said declarations was false and known by him to be false when made." On January 28, 1977, the defendant entered pleas of not guilty to all five counts. On March 10, 1977, the defendant filed a Motion for Bill of Particulars requesting that the government be ordered to set out "which declarations in paragraphs 4 and 5 of each count are inconsistent with each other, or, in the alternative, which of the statements alleged was false and known by the defendant to be false when made." In his Memorandum in Support of Motion for Bill of Particulars, the defense argued that it must be advised as to whether the government was proceeding on the theory that the declarations alleged were inconsistent to the degree that one was necessarily false, the theory authorized under subsection (c) of Title 18 U.S.C. §1623,

or alternatively, intended to prove that the defendant's June 16, 1976, grand jury declarations were false by showing the September 30, 1976, recantation before the local attorney. In the government's response to the Motion for Bill of Particulars, the prosecutor cited the legislative history for and the provisions under 1623(c), seemingly indicating its intent to proceed on an inconsistent declarations theory. The court, however, after hearing, denied the Motion for Bill of Particulars.

At the commencement of trial on April 13, 1977, the prosecutor in his opening statement used such phrases as "so logically and inherently inconsistent that one of the two times he had to be lying", "so inconsistent that he had to be lying at one of the two times", "two inconsistent statements, so inconsistent that you have to infer that one of them is false", "infer the falsity of one of the statements on the basis of their utter and complete inconsistency". It was thus clear that the theory of the prosecution was directed toward an inconsistent declarations theory provided for under 1623(c).

The government's first witness was the Clerk of the U. S. District Court for the District of Colorado, who identified the statement taken in the local attorney's office which had been admitted as an exhibit in U. S. v. Musgrave, et al. On cross-examination, the Clerk was asked to identify the use immunity orders compelling the appellant's testimony before the federal grand jury on June 16, 1976. (It should be noted that the appellant had claimed his Fifth Amendment privilege prior to entry of the immunity order.) The government next proceeded

to offer the immunized grand jury testimony and the subsequent recantation before the private attorney into evidence. The defendant objected on the basis that the immunized grand jury testimony could not be used in establishing the corpus delecti in an inconsistent declarations prosecution unless the government first showed that the immunity order had been violated and the defendant testified falsely before the grand jury, citing the Patrick case. The government next called a court reporter who indicated that he had taped appellant's statement in the local attorney's office on September 30, 1976. He, however, admitted on cross-examination that none of the deposition procedures provided in Title 18 United States Code, Section 3503 had been used in taking such statement. He conceded that Dunn had not been assured the right to the presence of an attorney, had not been advised of his rights as outlined in the statute, he had not given notice to any other parties in the proceeding, and had made no determination of Dunn's unavailability at any future proceedings in the pending criminal case.

At this juncture, it must be stated that as a result of Dunn's testimony before the federal grand jury, Phillip Musgrave and several other co-defendants were indicted for conspiracy to manufacture drugs. The government contended that the indictment resulted in part from Dunn's testimony. Dunn subsequently met Musgrave on the street and indicated that his testimony before the federal grand jury was false. Dunn, at Musgrave's insistence, accompanied Musgrave to his attorney's office whereafter Dunn recanted his grand jury testimony.

Defense counsel for the various co-defendants in the Musgrave case moved to dismiss the pending indictment on the grounds that it was based on perjured testimony. After hearing before the trial judge in the Musgrave case, the government negotiated reduced pleas, although the indictment was not dismissed.

After defendant's objections to the introduction of the affidavit taken in the local attorney's office and the immunized grand jury testimony were overruled and said documents were admitted, the government called the prosecutor who handled the grand jury investigation in U. S. vs. Musgrave, et al. He testified to the materiality of Dunn's testimony to the grand jury investigation. On cross-examination, however, the prosecutor indicated that there was no independent evidence to refute Dunn's grand jury testimony and in fact, much of the independent evidence corroborated it. The prosecutor further indicated that other than Dunn's own recantations, he was not aware of any independent evidence establishing the falsity of the federal grand jury testimony. Defense counsel cross-examined the prosecutor on each declaration Dunn had made before the federal grand jury and received indication that there was independent evidence to corroborate the greater majority of it. The government subsequently offered a transcript of testimony by appellant in a hearing in United States v. Musgrave, et al., on October 21, 1976. This was the testimony presented by counsel for the co-defendants in the Musgrave case to seek dismissal of the pending indictment. Defense counsel objected on the grounds that the statements or declarations made by Dunn in the October 21, 1976, pro-

ceedings were not set out as inconsistent declarations in the indictment; and further, that such statements had not been supplied by the government as required by Rule 16 of the Federal Rules of Criminal Procedure. The objections were overruled and the government closed its case. The defense moved for a judgment of acquittal relying on United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), holding that immunized testimony, to wit: Dunn's federal grand jury testimony, could not be used to establish the corpus delecti in an inconsistent declarations prosecution and further, that the statement taken in the local attorney's office could not be considered an inconsistent declaration in a proceeding before or ancillary to a federal court or grand jury, as required under 18 U.S.C. §1623(c). The government countered that the statement to the local attorney could be considered ancillary to a U. S. court proceeding because said attorney was representing a defendant in a pending matter in U. S. District Court. The defense countered that Section 1623 simply could not be stretched that far. The prosecutor once again affirmed that he was proceeding on an inconsistent declarations theory. Relying on said representation, the defense discharged its subpoenaed witnesses which were called to prove the truth of the grand jury testimony. The jury was instructed that the government need not prove which of the declarations was false, but that the defendant made "irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to a court or grand jury." In its decision affirming appellant's conviction

in the United States Tenth Circuit Court of Appeals, the appellate court affirmed Dunn's position that the proceedings in the local attorney's office could not be deemed to be a proceeding ancillary to a U. S. Court or federal grand jury proceeding. The Tenth Circuit, however, affirmed the conviction on the basis of Dunn's statements in the October, 1976, proceeding, admitting that his grand jury testimony was false. However, as pointed out in appellant's Petition for Rehearing, Dunn's statements in the October, 1976, proceeding were as follows:

"Q Was what you told the grand jury true?

A No, sir.

Q Was any part of it true?

A Possibly ten percent."

Appellant contends that this admission before a federal judge cannot be used as an inconsistent declaration in a proceeding under 18 U.S.C. §1623(c). The falsity of the federal grand jury testimony was never before the court and was never presented to the jury as a prosecution theory. The trial jury rendered a verdict solely on the basis of inconsistent declarations; one said declaration having been made before a grand jury, the other in a taped recording in a local attorney's office. Appellant argued that such decisions as United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), United States v. Housand, 550 F.2d 818 (2nd Cir. 1977), United States v. Berardelli, 565 F.2d 24 (2nd Cir. 1977), could not on the one hand sustain the theory that a witness could not be prosecuted for inconsistent declarations thus being compelled

to testify in a grand jury or court proceeding and on the other, subject him to inconsistent declarations prosecution by the use of immunized grand jury testimony in establishing the corpus delicti. Though the Tenth Circuit did not overrule said three cited cases, it did not render a decision in Dunn that could be deemed consistent with Patrick, Housand or Berardelli. Appellant argued that the government simply could not have it both ways. During the proceedings before the federal judge on October 21, 1976, seeking to dismiss the indictment, no attorney sought to take each specific declaration that Dunn had made before the federal grand jury and determine its inconsistency for the court. Such testimony was not and could not have been presented as inconsistent declarations since no declarations inconsistent with the federal grand jury testimony were presented; only an admission that ten percent of the statements before the federal grand jury were true. Appellant's Petition for Rehearing is still pending before the Tenth Circuit Court of Appeals.

6. The basis of federal jurisdiction in the first instance was that the appellant was charged in the District of Colorado with a violation of Title 18 United States Code, Section 1623.

7. The appellant argues for allowance of a Writ of Certiorari on the basis that the government's reliance on immunized testimony in establishing the corpus delicti in an inconsistent declarations prosecution cannot be sustained. To compel the defendant on the one hand to testify truthfully under an order of immunity thereby setting aside his Fifth

Amendment claim, but on the other hand, prosecuting him for inconsistent declarations without proving a violation of the immunity order is a violation of due process and his Fifth Amendment privilege. Until and unless the government proved that he testified falsely before the federal grand jury, it could not use his grand jury testimony to establish the corpus delicti in an inconsistent declarations prosecution. To do so, the Tenth Circuit Court must overrule the Patrick, Housand and Berardelli decisions. The Tenth Circuit, though not overruling said decisions, never explained how the government accomplished its conviction without violating the reasoning contained in those opinions. Further, the appellate court cannot sustain a conviction based on the government's use of an admission that grand jury testimony was false when the trial jury was told that the falsity of the federal grand jury testimony was not at issue. Such a conviction certainly cannot be sustained in light of the admission by the government that all the independent evidence pointed to the truthfulness of the federal grand jury testimony.

Based on the above circumstances, this Honorable Court is urged to grant a Writ of Certiorari so that it may review the conviction of the appellant below.

Respectfully submitted,

DANIEL J. SEARS
Federal Public Defender

United States Court of Appeals
TENTH CIRCUIT
OFFICE OF THE CLERK
469 UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

TELEPHONE
303-837-3157

HOWARD K. PHILLIPS
CLERK

June 5, 1978

Mr. Daniel J. Sears
Federal Public Defender
P. O. Drawer 3605
Denver, Colorado 80294

Re: No. 77-1398
U.S.A. v. Robert Dunn

Dear Mr. Sears:

Enclosed is a copy of the Court's opinion in the captioned case. Judgment has been entered today in accordance with the opinion.

Very truly yours,

Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

bmt

Enclosure

cc: Honorable Sherman G. Finesilver
Joseph F. Dolan, U. S. Attorney; Edward W. Nottingham, Asst. U. S. Attorney, 323 U. S. Courthouse, Denver, Colorado 80294
Robert Dunn, c/o Federal Public Defender

FILED
United States Court of Appeals
Tenth Circuit
JUN 5 1978
HOWARD K. PHILLIPS
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ROBERT DUNN,
Defendant-Appellant.

NO. 77-1398

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 76-CR-322)

Daniel J. Sears, Federal Public Defender, on the brief for appellant.
Edward F. Nottingham, Asst. U. S. Attorney, (with Joseph F. Dolan, U. S. Attorney, on the brief) for appellee.

Before BARRETT, DOYLE, LOGAN, Circuit Judges

BARRETT, Circuit Judge

Robert Dunn appeals from his conviction of making false statements before a grand jury in violation of 18 U.S.C. §1623.

FACTUAL BACKGROUND:

In June 1976, under a grant of immunity pursuant to 18 U.S.C. §6002, Dunn presented testimony to a grand jury investigating illegal drug activity in the Colorado State Penitentiary. Dunn's testimony implicated Phillip Musgrave in the crimes under investigation. Following the grand jury proceeding, Musgrave and others were indicted on charges of conspiring to manufacture and distribute controlled substances. (United States v. Musgrave, et al, No. 76-Cr-155.)

Subsequently, in September 1976, Dunn appeared in the office of Michael Canges, attorney for Phillip Musgrave. In the presence of Canges and Gerald Cohen, a notary public, Dunn gave an oral statement under oath which was recorded and transcribed wherein he recanted his grand jury testimony implicating Musgrave. (Vol.I at 74-83; Vol.II at 144-147). Dunn stated that much of what he had previously told the grand jury was not true. (Vol. I at 68-73). At the time Dunn made the statement, he was not represented by counsel. However, there is nothing in the record which indicates that Dunn could not have appeared with counsel or that his statement was not completely voluntary. Dunn was fully cognizant that Canges was representing Musgrave.

Thereafter, Michael Canges notified the United States Attorneys' office of Dunn's recantation of his grand jury testimony. Canges filed a transcript of Dunn's sworn statement with the district court wherein the Musgrave prosecution was pending. Motions were filed on behalf of Musgrave and others challenging the indictments on the basis that such indictments had been returned predicated on false grand jury testimony. An evidentiary hearing on these motions was held before Judge Winner in October 1976. At that time Dunn, who was then represented by counsel, reaffirmed under oath that he had lied to the grand

jury. His testimony of course, was duly reported and transcribed. As a result, the charges against Musgrave were subsequently reduced.

Thereafter, Dunn was indicted and charged with five counts of making false statements to a grand jury in violation of 18 U.S.C. §1623. The evidence against Dunn admitted at trial included: Dunn's grand jury testimony, Dunn's Canges statement, and relevant portions of Dunn's testimony at the Musgrave motion hearing. At Dunn's trial, testimony was given by the notary public who had administered the oath to Dunn in Canges' office, and by the United States Attorney in charge of the grand jury proceeding. The jury found Dunn guilty on three counts of perjury before the grand jury.

On appeal Dunn contends that the trial court erred in 1) ruling that the proceeding in Canges' office was a proceeding ancillary to a court or grand jury of the United States, and 2) ruling that immunized grand jury testimony could be used to establish the corpus delecti in an inconsistent declarations prosecution.

PRELIMINARY DISCUSSION:

Before proceeding to the specific issues at hand, it is necessary to discuss in some detail the pertinent statutes and the indictment as drafted against Dunn, as such have a significant bearing upon the specific issues raised on appeal.

18 U.S.C. §1623, captioned "False Declarations Before a Grand Jury or Court" provides that:

> "(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information . . . knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. §1623(c), outlines a statutory method of charging a witness with violating §1623(a):

"(c) An indictment or information for violation of this section alleging that in any proceeding before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false need not specify which declaration is false . . ."

In addition, §1623(c) sets forth a method for proving false declarations:

"In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury."

Thus, §1623(c) eliminates the two witness rule which is otherwise required to prove perjury. The government need not prove which of the declarations was false through extrinsic evidence, but rather, the falsity of one of the two declarations is inferred from their inconsistency with each other. United States v. Slawik, 548 F.2d 75 (3rd Cir.1977); United States v. Patrick, 542 F.2d 381 (7th Cir.1976), cert. denied 430 U.S. 931.

Turning now to the government's indictment of Dunn, all counts of the indictment read that:

"On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a grand jury of the United States in the District of Colorado, did knowingly make a false material declaration . . . in violation of Title 18, U.S.C. §1623."

The indictment quotes the appropriate portions of Dunn's initial grand jury testimony from a certified transcript wherein Dunn made statements implicating Musgrave. The indictment also quotes statements contradicting Dunn's grand jury testimony made in Canges' office. The concluding portion of each count against Dunn included this language:

"6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs (4) and (5) of this count were

inconsistent to the degree that one of said declarations was false and known by him to be false when made."

In the preliminary stages of the proceedings below, Dunn moved for a bill of particulars to determine which statements the government intended to prove were false. The need for clarification is obvious. As quoted above, each count of the indictment specified that during Dunn's appearance before the grand jury in June, 1976 he knowingly made false material declarations. On the other hand, the concluding portion of each count indicated that the government was relying on 18 U.S.C. §1623(c), where, as explained above, inconsistencies between Dunn's grand jury testimony and Dunn's Canges statement would be sufficient to prove the falsity of one or the other of them.

In response to Dunn's request for a bill of particulars, the government claimed to rely upon §1623(c). The government and Dunn proceeded upon this theory of the case. For example, Dunn's counsel properly concluded that evidence to show that Dunn's June grand jury testimony was in fact true would be irrelevant in a §1623(c) prosecution. (Vol. II at 87, 113-114, 127-128, 153, 168). Of course, if the government had not chosen to proceed upon the inconsistent declarations theory, the government would have had to state which statements it intended to prove false, and Dunn's defense would have been to demonstrate that in fact such specified testimony was true. In addition, the jury was properly instructed that under 1623(c) the jury need not find which of the statements, that is, Dunn's June grand jury testimony or Dunn's Canges statement, was false, but rather that the jury need only find that the statements were so inconsistent that one had to be false. (Vol.II at 179).

CANGES' STATEMENT

Dunn's first argument is that the proceedings in Canges' office did not constitute a proceeding ancillary to a grand jury or court proceeding so as to come within the meaning of §1623(a) and (c).

The term "ancillary proceeding" has seldom been construed. Nor has the question of what other statement may be used to show inconsistency with grand jury testimony. "Ancillary proceeding" is generally defined as "one subordinate to or in aid of another primary action". Black's Law Dictionary (4th Ed.1968) at 112.

In the absence of a clear meaning for the term "ancillary proceeding", Dunn argues that his statement made in Canges' office was not taken in a proceeding before or ancillary to the grand jury. He argues that Gerald Cohen was not an officer for the United States District Court for the District of Colorado such that a statement taken by him could be ancillary to the federal court proceedings in United States v. Musgrave, and stresses that he was not advised of his rights nor was counsel present. Dunn analogizes to 18 U.S.C. §3503, which provides the method for taking depositions of unavailable witnesses, and implies that procedures more closely adherent to those outlined in §3503 may be found to be ancillary to a grand jury proceeding.

On the other hand, the government submits that Dunn's affidavit in Canges' office was taken in a proceeding ancillary to the grand jury proceeding, where the testimony was given under oath, administered by a notary public authorized to do so, where the testimony was taken in the office of an attorney of a defendant in a federal court proceeding, and where the affidavit was filed in that court proceeding and influenced the outcome of that proceeding.

This court has concluded that while the Canges statement is "ancillary", in the sense that it is connected to and had an effect upon the grand jury proceeding, the event occurring in Canges' office, in and of itself, is not a "proceeding" within the meaning of the statute so as to be a proceeding ancillary to a grand jury proceeding. Despite the administration of the oath and presence of the notary public, we hold that the event lacks the degree of formality the statute requires.

The court further concludes that Dunn's subsequent affirmation of his Canges statement, in the course of the hearing conducted in

the district court on Musgrave's motion to dismiss the indictment, clearly constitutes a proceeding ancillary to the grand jury proceeding. Thus, the admission into evidence of Dunn's testimony during the hearing on Musgrave's motion was proper in that it constituted an affirmation and adoption of the Canges statement, supportive thereof and cumulative in nature.

Furthermore, the admission into evidence of Dunn's testimony given at the Musgrave hearing does not create a fatal variance between proof at trial and the indictment. This court has consistently held that a variance between the indictment and evidence is not fatal unless the defendant could not have anticipated from the indictment what evidence would be presented at trial or unless the conviction based on an indictment would not bar a subsequent prosecution. United States v. Cowley, 452 F.2d 243 (10th Cir.1971); United States v. Freeman, 514 F.2d 1184 (10th Cir.1975). Clearly, where Dunn's testimony in the Musgrave motion hearing was inextricably related to his Canges statement, that is, affirming the truth of the latter, it cannot be said that Dunn could not have anticipated that such evidence would be presented against him at his perjury trial.

Finally, the court has also considered whether the indictment brought against Dunn meets the standards for sufficiency of an indictment as set forth in United States v. Radetsky, 535 F.2d 556 (10th Cir.1976). The government has repeatedly stated its reliance upon §1623(c) in this case. Therefore, to state an offense under that statute, the government had to allege inconsistent statements by Dunn made in one or more proceedings ancillary to a grand jury or court. In the indictment the government pleaded Dunn's grand jury testimony and Dunn's Canges statement, the latter of which we have determined is in and of itself not taken in a proceeding ancillary to the grand jury. While Dunn's testimony at the Musgrave hearing is clearly taken in a proceeding ancillary to the grand jury the government completely failed to plead such testimony in the indictment.

However, the sufficiency of an indictment is to be determined by practical rather than technical considerations, United States v. Crim, 527 F.2d 289 (10th Cir.1976), cert. denied 425 U.S. 905. Viewed in this practical light, where excerpts from the Canges statement were necessarily included in the indictment to establish "inconsistency", and where the Canges statement was inextricably related to Dunn's testimony in the Musgrave hearing which was taken in an ancillary proceeding, we hold that the indictment sufficiently states an offense under §1623(c).

GRAND JURY TESTIMONY:

Having established by response to the bill of particulars that the government intended to prove a violation of §1623(a) through the use of the method prescribed in §1623(c), Dunn contends that immunized grand jury testimony may not be used to establish the corpus delecti of a prosecution for inconsistent declarations without a prior showing of its falsity.

Prior to his testimony before the grand jury, Dunn was granted immunity in accord with 18 U.S.C. §6002 which provides:

> No testimony or other information compelled under the order may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

It is hornbook law that testimony given by a witness under a grant of immunity cannot be used to incriminate him in crimes or activities concerning which he gives testimony. Kastigar v. United States, 406 U.S. 441 (1972). However, the grant of immunity is never a license to commit perjury. In United States v. Tramunti, 500 F.2d 1334, 1344 (2nd Cir. 1974), cert. denied 419 U.S. 1079, the court stated:

> "The immunity granted by the court does not confer upon the witness the right to perjure himself or withhold testimony. . . . The very purpose of the granting of immunity is to reach the truth and when that testimony is

> incriminating, it cannot be used against him. If the witness thwarts the inquiry by evasion or falsehood, as the appellant did here, such conduct is not entitled to immunity. In fact, another crime not existing when the immunity was offered is thereby committed. The immunity does not extend in futuro."

Neither the Fifth Amendment nor statutory immunity offers a witness protection against prosecution for perjury, United States v. Frumento, 552 F.2d 534 (3rd Cir. 1977). In United States v. Mandujano, 425 U.S. 564, 576 (1976), Chief Justice Burger, speaking for the court, described the sanctions available to the government when an immunized witness commits perjury:

> "On the other hand, when granted immunity, a witness once again owes the obligation imposed upon all citizens - - the duty to give testimony - - since immunity substitutes for the privilege.
>
> "In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is - - and even the solemnity of the oath - - cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by several penalities; in no other way can criminal conduct be flushed into the open where the law can deal with it."

§1623 is a species of perjury. Its enactment was intended to facilitate perjury prosecutions and establish a new false declaration provision applicable to federal grand jury and court proceedings. United States v. Gross, 511 F.2d 910 (3rd Cir. 1975), cert. denied 423 U.S. 924; Organized Crime Control Act, Title IV, 1970 U.S. Code Cong. and Ad. News at 4007, 8.

We feel that Congress intended to include §1623 false declarations prosecutions within the perjury exceptions to the immunity grant of §6002. But see United States v. Berardelli, 565 F.2d 24, 29 (2nd Cir. 1977). Such interpretation is in the spirit of the perjury statutes, to insure against wrongs to the court and

to meet the ends of justice. Bronston v. United States, 409 U.S. 352 (1973). We observe that it would be an affront to the basic purpose of the criminal justice system to permit one to avoid likely prosecution under the grant of immunity. The import of statements made in the context of a grand jury proceeding were recognized by the Supreme Court in United States v. Harris, 311 U.S. 292 (1940):

> Section 125 of the Criminal Code makes no distinction between the false assertions of the fact of prior statements and the false assertions of any other fact. Nor can we see any reason to make one. As the Government points out, the denial of the fact that certain statements have been made may be equally as clear, deliberate, and material a falsehood as the denial of any other fact. And since statements made to government agents are generally one of the bases upon which criminal proceedings are instituted and indictments returned, such a distinction might substantially impede effective administration of criminal law. (Emphasis supplied.)
>
> 311 U.S., at p. 295.

We have carefully studied the cases relied upon by Dunn, including United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); United States v. Housand, 550 F.2d 818 (2nd Cir. 1977), cert. denied, 431 U.S. 970 (1977); and United States v. Berardelli, supra. These cases involve the interrelationship between §6002 immunity, the Fifth Amendment, and §1623(c) inconsistent declarations prosecutions. Arising in different factual contexts, these decisions basically stand for the general proposition that immunized testimony may not be used to establish the corpus delecti of an inconsistent declarations prosecution without a prior showing of falsity.

However, unlike the fact situations of the above decisions relied upon by Dunn, Dunn's subsequent testimony in his Canges affidavit and in the Musgrave motion hearing not only were inconsistent with his immunized grand jury testimony, but, significantly, contained Dunn's admission that he had in fact testified falsely before the grand jury. Even though we have held that the government need not prove which of Dunn's statements were false for purposes of sustaining his conviction under §1623(a), (c), and while we do not decide whether, under other circumstances, immunized testimony may be admitted to demonstrate inconsistency without a prior showing of falsity, in our view Dunn's unequivocal admission that his immunized testimony before the grand jury was false justified the use of such immunized testimony to establish the corpus delecti of the present prosecution.

Immunity statutes are, of course, ordinarily for the benefit of the government, designed to effectively serve the compelling needs of the criminal justice system by preventing a substantial avoidance of prosecution and penalty. Dunn has grossly abused those purposes. In Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), the Supreme Court said, inter alia:

> . . . Plainly the offer of immunity contained in the voluntary disclosure policy presupposed, at the very least, that a delinquent taxpayer would make a "clean breast of things" . . . . [in] deciding whether to disclose or run the risk of prosecution petitioners were initially justified in relying on the Treasury's general offer of immunity . . . once a fraudulent disclosure had been determined upon they must be deemed to have recognized that such an offer had in effect been withdrawn as to them or, amounting to the same thing, that they were no longer entitled to place reliance on it.

> Petitioners are thus in legal effect left in no better position than they would have been had the treasury formally withdrawn its offer of immunity before their disclosure figures were furnished. (Underlining supplied.)
>
> 371 U.S., at pp. 349, 350.

In the instant case, Dunn's recantation was, in an analogy to Shotwell, supra, an admission that he had not made a "clean breast of things" in his immunized testimony before the grand jury which implicated Musgrave. Thus, such false testimony stripped him of the cloak of immunity which he was initially entitled to rely upon. Dunn's recantation thus -- as in Shotwell -- in legal effect left him in no better position than he would have been in had the Government formally withdrawn its offer of immunity before he testified before the grand jury.

WE AFFIRM.